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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-

ELLIOT L. RICHARDSON, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

RESERVISTS COMMITTEE TO STOP THE WAR, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Secretary of Defense, and the Secretaries of the Army, Navy and Air Force, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The judgment of the court of appeals (App. A, *infra*, pp. 15-16) was entered without an opinion. The opinion of the district court (App. B, *infra*, pp. 17-36) is reported at 323 F. Supp. 833.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1972. On January 26, 1973, the Chief Justice extended the time within which to file a petition for a writ

of certiorari to and including February 28, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether respondents have standing, either as citizens or as federal taxpayers, to challenge the right of congressmen to hold commissions in the Armed Forces Reserves as violating Article I, Section 6, Clause 2 of the Constitution, which prohibits any Senator or Representative from "holding any Office under the United States * * * during his Continuance in Office."

2. Whether the present suit contesting the Reserve status of members of Congress raises only a political question concerning a congressman's qualifications, which under Article I, Section 5, Clause 1 of the Constitution is a matter reserved to the Legislative Branch.

3. Whether membership in the Ready, Retired and Standby Reserves constitutes an "Office under the United States" within the meaning of Article I, Section 6, Clause 2 of the Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 5, Clause 1 of the Constitution provides in pertinent part:

> Each House shall be the Judge of the Elections, Returns, and Qualifications of its own members * * *.

Article I, Section 6, Clause 2 of the Constitution provides:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments

whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

STATEMENT

This class action was commenced in the United States District Court for the District of Columbia by a national association, Reservists Committee to Stop the War, and several named members thereof, seeking a judicial declaration that all members of the United States Congress who hold commissions in the Armed Forces Reserves are in violation of Article I, Section 6, Clause 2 of the United States Constitution.[1] The complaint asks that defendants, the Secretary of Defense and the Secretaries of the Army, Navy and Air Force, be ordered to remove all active congressmen from the Reserve rolls, be enjoined permanently from adding newly-elected congressmen to the Reserve rolls, and be required to reclaim any reservists' pay that members of Congress may have received during their terms in office. Entitlement to such relief is grounded on the claim that the Reserve status of members of Congress adversely affects plaintiffs, both individually and as a class, by depriving them of "the unbiased consideration by the Congress and its members of measures before the Congress affecting the military establishment and appropriations therefor, including appropriations for compensation and pensions for members of the Reserves, and measures relating to military action, war and peace" (App. C, *infra*, p. 42).

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[1] The complaint, which is set forth at App. C, *infra*, pp. 37-48, alleges that the Committee is comprised of present and former reservists who oppose the United States' involvement in Vietnam. The individual plaintiffs include the Committee's co-chairman, two officers of the Naval Reserve, an enlisted member of the Air Force Reserve and an enlisted member of the Army Reserve.

No member of Congress was made a party to the suit. The class allegedly being represented consists of all officers and enlisted members of the Reserves who are not members of Congress, all other citizens and taxpayers of the United States, and, in addition, any person who, although neither a reservist, a citizen, nor a taxpayer, opposed the United States' military involvement in Vietnam (*id.* at 41-42).

Both sides moved for summary judgment. Defendants argued (1) that plaintiffs lacked standing to challenge the Reserve status of congressmen, (2) that the question raised, moreover, concerned only the "qualifications" of Senators and Representatives and thus was not a proper subject for the judiciary under Article I, Section 5, Clause 1 of the Constitution, and finally (3) that membership in the Ready, Retired and Standby Reserves was, in any event, not an "Office under the United States" within the meaning of Article I, Section 6, Clause 2 of the Constitution. Following a hearing, the district court granted plaintiffs' motion for summary judgment insofar as it sought a declaratory judgment that members of Congress are "ineligible to hold a commission in the Armed Forces Reserve during [their] continuance in office" (App. B, *infra*, p. 36). The plaintiffs' motion was denied, however, with respect to the claims for injunctive relief and for reclamation of reservists' pay.[2]

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[2] In declining to grant injunctive relief, the court noted that it "must take into account the importance of its action to persons not before the Court, and the fact that any resolution of the matter must necessarily involve coordinate branches of the Government." "In the absence of an urgent necessity," the court stated, it would assume that "Congress and the Executive" will "accommodate themselves voluntarily to the decision * * * having due regard for the special status of Congressmen then seated" (App. B, *infra*, pp. 34-35).

The court held that plaintiffs lacked standing as reservists and as federal taxpayers but had standing as citizens. Observing that "in this Circuit the concept [of standing] has now been almost completely abandoned" (App. B, *infra*, p. 27), the court concluded that "the interest of plaintiffs as citizens is undoubtedly one which was intended to be protected by the constitutional provision involved" (*id.* at 31). "[I]f these plaintiffs cannot obtain judicial review of defendants' action," it stated (*ibid.*), "then as a practical matter no one can."

The issue presented, it further held (App. B, *infra*, pp. 31-34), was a proper matter for judicial review, notwithstanding that Article I, Section 5, Clause 1 of the Constitution "commits to Congress the decision whether any individual is qualified to sit in Congress" (*id.* at 34). That provision, the court stated (*ibid.*), "does not bar judicial consideration of the question whether executive action must be taken to carry out a constitutional mandate." In its view, since Article I, Section 6, Clause 2 "was intended simply to declare the incompatibility of a seat in Congress and an office in the Executive or the Judiciary" (*id.* at 32), the courts can properly determine whether congressmen must give up their reserve commissions to satisfy that constitutional command.

Finally, on the merits the district court concluded that Article I, Section 6, Clause 2 had been added to the Constitution as a result of the Framers' belief "in the principle of separation of powers" and their "desire to avoid the example of England, where, the Framers believed, elected officials had been subverted by appointments to office by the Crown" (App. B, *infra*, p. 20). While recognizing "the limited nature of the relationship between the Executive branch and a private citizen who may be an inactive Reserve officer" (*id.* at 26), the court held that member-

ship in the Ready, Retired and Standby Reserves is an "Office under the United States" under Article I, Section 6, Clause 2 "in light of the purpose of the Framers, who erected an inflexible barrier against Congressmen holding or being appointed to any other office under the United States" (*ibid.*).[3]

The court of appeals affirmed without opinion, "on the basis of the memorandum opinion of the District Court" (App. A, *infra*, p. 16). The court further stated (*ibid.*): "We are also of the view that plaintiffs have the requisite standing and that their claim is judicially enforceable under the rationale of *Flast* v. *Cohen*, 392 U.S. 83 (1968), and *Baker* v. *Carr*, 369 U.S. 186 (1962)."

REASONS FOR GRANTING THE WRIT

1. The decisions below represent a significant extension of the decisions of this Court, including *Ex parte Levitt*, 302 U.S. 633, *Flast* v. *Cohen*, 392 U.S. 83, and more recently *Sierra Club* v. *Morton*, 405 U.S. 727, which consistently have held that citizens have no standing to challenge government programs or activities which they consider objectionable unless they show some individualized, personal "injury in fact." Here the district court, although acknowledging that the alleged injury "is hypo-

[3] Department of Defense Directive 1200.7 (July 2, 1970) required the transfer of members of Congress in the Ready Reserve to Retired or Standby Reserve status. At the time of the district court decision 64 members of Congress were in the Retired Reserve, 21 members were in the Standby Reserve on the inactive status list, and 34 members were in the Standby Reserve on the active status list. See the joint appendix in the court of appeals, pp. 22-31, 37-38, 45; a copy of the appendix is being lodged with the Clerk of this Court. The Department of Defense advises us that this total of 119 members of the 92d Congress in Retired and Standby Reserve status has changed to a total of 104 members of the 93d Congress in such Reserve status (see App. D, *infra*, pp. 49-51).

thetical" (App. B *infra*, p. 30), upheld plaintiffs' standing to contest the Reserve status of congressmen "in their capacity as citizens of the United States" (*ibid.*), stating that "in this Circuit the concept [of standing] has now been almost completely abandoned" (*id.* at 27). The summary affirmance by the court below marks the first time that a federal court of appeals has conferred on citizens, simply by virtue of their citizenship, standing to challenge government action on constitutional grounds. The decision, if left undisturbed, is almost certain to spawn a significant number of suits by citizens seeking, contrary to *Flast* v. *Cohen*, *supra*, 392 U.S. at 106, "to employ a federal court as a forum in which to air [their] generalized grievances about the conduct of government or the allocation of power in the Federal System." It therefore warrants review by this Court.

A. In *Ex parte Levitt*, *supra*, a citizen's suit to disqualify a Justice of this Court on the ground that his appointment and confirmation violated the "ineligibility" provision of Article I, Section 6, Clause 2 of the Constitution [4] was dismissed on the ground of lack of standing. The Court rested its decision on the

> * * * established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public. * * * [302 U.S. at 634.]

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[4] The constitutional provision forbids a congressman from resigning to accept any civil office under the United States if the office was created or its emoluments increased during the term for which he was elected.

That principle was recently reaffirmed in *Sierra Club* v. *Morton, supra,* where the Court declined to abandon "the requirement that the party seeking review must have himself suffered an injury," noting that "if any group with a bona fide 'special interest' " could sue in the federal courts, "it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so" (405 U.S. at 739-740). And see *Laird* v. *Tatum,* 408 U.S. 1, 13.[5]

Like *Ex parte Levitt,* the instant case involves a challenge under Article I, Section 6, Clause 2 of the Constitution; here it is to the eligibility of congressmen to hold Reserve commissions. But plaintiffs do not claim they "[have] sustained or [are] immediately in danger of sustaining a direct injury" (302 U.S. at 634) by virtue of the existing practice. Their claim, as the district court observed (App. B, *infra,* p. 31), is based instead on "a general interest common to all members of the public" (302 U.S. at 634), which this Court has consistently held to be insufficient for standing purposes.[6]

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[5] See also Note, *Constitutional Law—Standing of United States Citizens Qua Citizens to Bring Public Actions in the Federal Courts—Article I, Section 6, Clause 2,* 19 Wayne L. Rev. 221, 235 (1972).

[6] In *Baker* v. *Carr,* 369 U.S. 186, relied on by the courts below, this Court held that individuals whose votes are impaired by the unequal apportionment of election districts have standing because "[t]hey are asserting a 'plain, direct and adequate interest in maintaining the effectiveness of their votes' * * *not merely a claim of the 'right, possessed by every citizen, to require that the Government be administered according to law* * *'" (369 U.S. at 208). Similarly, in *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150, cited by the district court, standing was premised on an allegation of personal economic loss. And see *Barlow* v. *Collins,* 397 U.S. 159.

Not only do the decisions below break with the authoritative precedents of this Court; they also conflict with decisions by other courts of appeals dealing with standing. See *Troutman* v. *Shriver*, 417 F. 2d 171, 174 (C.A. 5), certiorari denied, 397 U.S. 923 (citizen lacks standing to challenge constitutionality of Economic Opportunity Act); *Velvel* v. *Nixon*, 415 F. 2d 236 (C.A. 10), certiorari denied, 396 U.S. 1062 (citizen lacks standing to challenge constitutionality of Vietnam War); *Pietsch* v. *President of the United States*, 434 F. 2d 861 (C.A. 2), certiorari denied, 403 U.S. 920 (same); *Lamm* v. *Volpe*, 449 F. 2d 1202 (C.A.10) (citizen lacks standing to challenge constitutionality of Highway Beautification Act).

B. The judgment of the court of appeals stated (App. A, *infra*, p. 16): "We are also of the view that plaintiffs have the requisite standing and that their claim is judicially enforceable under the rationale of *Flast* v. *Cohen*, 392 U.S. 83 (1968), and *Baker* v. *Carr*, 369 U.S. 186 (1962)." It is unclear whether the court below considered the decision in *Flast* as support for the position that plaintiffs had standing as *citizens*, on the theory, adopted by the district court, that the Court in that decision "abandoned the requirement of a significant demonstrable injury to the plaintiff" (App. B, *infra*, p. 28), or whether its reliance on *Flast* was intended to suggest, contrary to the district court (*id.* at 29-30), that these plaintiffs also had standing as federal *taxpayers*.[7]

[7] We do not believe the court of appeals disturbed the district court's holding — with which we agree — that plaintiffs lacked standing in their capacity as Reservists (App. B, *infra*, p. 29).

We have already indicated the reasons for our disagreement with the former proposition. With respect to the latter theory, we think that the district court correctly determined that plaintiffs lacked standing as taxpayers, since Article I, Section 6, Clause 2 "cannot fairly be construed as a limitation on the taxing and spending power of Congress," and since "[p]laintiffs' claim in no way depends upon the fact that some Congressmen receive pay as Reservists" (App. B, *infra*, pp. 29-30). There is thus missing in this case "that 'logical nexus between the status [of taxpayers] and the claim sought to be adjudicated' which is required by *Flast*" (*id.* at 30). See *Richardson* v. *Kennedy*, 313 F. Supp. 1282 (W.D. Pa.), affirmed, 401 U.S. 901; but see *Richardson* v. *United States*, 465 F. 2d 844 (C.A. 3), pending on writ of certiorari *sub nom. United States* v. *Richardson*, No. 72-885, granted February 26, 1973.

2. Apart from the standing question, this case presents an issue of first impression concerning which of the coordinate branches of government should resolve the matter of a congressman's eligibility to hold a commission in the Armed Forces Reserves during his elected term. Article I, Section 5, Clause 1 of the Constitution reserves to each House the exclusive authority to pass on the "Qualifications of its own Members * * *." This Court, in *Powell* v. *McCormack*, 395 U.S. 486, 520, n. 41, left open the question whether the term "Qualifications" in that constitutional provision embraces, in addition to age, citizenship and inhabitancy (Art. I, Sec. 2), the ban against "holding any Office under the United States" embodied in Article I, Section 6, Clause 2. That question is squarely presented here and warrants the consideration of this Court.

The courts below concluded that Article I, Section 6, Clause 2 "was intended simply to declare the incompat-

ibility" of a seat in Congress and a position in the Executive or Judicial Branches of government (App. B, *infra*, p. 32); it was not, in their view, meant as a constitutional "qualification" on membership in either House. But the understanding of the Framers appears to be otherwise. The primary purpose for barring congressmen from "'holding any office under the United States'" was to guard "against the danger of executive influence upon the legislative body * * *." *The Federalist*, No. 76 (1852 ed.). Thus, the Framers included among "[t]he qualifications of the elected * * * [which] have been properly considered and regulated by the convention" that a congressman "during the time of his service, must be in no office under the United States." *The Federalist*, No. 52 (1852 ed.).[8]

Whether members of Congress can satisfy that "qualification" if, while seated, they remain in the Retired or Standby Reserves (see n. 3, *supra*), is not a proper subject for judicial scrutiny. Article I, Section 5, Clause 1 contains "a textually demonstrable constitutional commitment of the issue to a coordinate political department" (*Baker* v. *Carr*, *supra*, 369 U.S. at 217). It provides that "Each House shall be the Judge * * *" of such matters.

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[8] See also Dionisopoulos, *A Commentary on the Constitutional Issues in the Powell and Related Cases*, 17 J. Pub. Law 103, 111-115 (1968).

Compare *Roudebusch* v. *Hartke*, 405 U.S. 1525.[9] Thus the courts below had no jurisdiction to pass on the "qualification" issue presented in this case. See generally, Recent Decisions, *Constitutional Law, Reservists Committee to Stop the War* v. *Laird*, 40 Geo. Wash. L. Rev. 542, 549-558 (1972).

3. Finally, we submit that the ruling below on the merits, which directly affects a number of congressmen who now hold commissions in the Armed Forces Reserves, presents an important constitutional question which this Court should review. In *United States* v. *Hartwell*, 6 Wall. 385, 393, the term "office" was held to imply "continuing and permanent" duties, "emoluments," "tenure" and "duration." These characteristics, however, have little application in the context of the Retired and Standby Reserves.

Members of such Reserve units do not have continuous and permanent duties; they are not required to train and they are not generally subject to military discipline. Indeed, with but one minor exception pertaining to active-status Standby Reservists—who are each year subject to call

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[9] Congress has, until now, consistently been deemed to have the responsibility to judge whether its members are disqualified from being seated by virtue of their holding an office under the United States. See, e.g., 1 Hinds, *Precedents of the House of Representatives*, 592-603, 612, 620-632 (1907); 6 Cannon, *Precedents of the House of Representatives*, 67-69 (1936). With specific reference to the Reserve status of Senators and Representatives, Congress has considered whether membership in the Reserves is a basis for disqualification within the meaning of Article I, Section 6, Clause 2 (see S. Res. 142, 88th Cong., 1st Sess. (1963); H. Res. 353, 369, 377, 88th Cong., 1st Sess. (1965)); it has, however, taken no action to disqualify its members on this ground. And see Section 37 of the National Defense Act of 1930, 5 U.S.C. 2105(d), which provides that a Reservist not on active duty or on active duty training does not hold an "office of trust or profit." See also 109 Cong. Rec. 10000-10002 (1963).

for one 15-day period—these Reservists stand on virtually the same footing as all civilians: they can be activated for military duty only if Congress declares war or a national emergency. See 10 U.S.C. 267(b), 672(a), 802.[10] Retired and Standby Reservists also receive no "emoluments." The retirement pay received by Retired Reservists is paid independent of their present status and is "in the nature of a pension." 10 U.S.C. 1331; 48 Comp. Gen. 699, 701 (1969).[11] Moreover, the commissions of Retired and Standby Reservists are "for an indefinite term" and, with certain limitations,[12] are "held during the pleasure of the President" (10 U.S.C. 593(b)).

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[10] A Retired and inactive-status Standby Reservist may not train. Department of Defense Directive 1235.9, section IV, A, 4 (September 13, 1967). An active-status Standby Reservist may volunteer to train, at his own expense, without pay or allowances. Department of Defense Directive 1215.6, section IV, E, 4 and IV, F, 3 (June 12, 1971). A Reservist would be subject to military discipline if called to duty upon a declaration of war or national emergency, or, in the case of an active-status Standby Reservist, when voluntarily training. A Retired Reservist would also be subject to the Uniform Code of Military Justice when "receiving hospitalization from an armed force." 10 U.S.C. 802(3), (5).

[11] Forty-nine of the 64 congressmen in the 92d Congress in Retired status (C.A. App. 22-31, 37-38, 45) received no pay at all (55 of the 71 congressmen in the 93d Congress in Retired Reserve status also receive no pay, pp. 49-51, *infra.*). Inactive-status Standby Reservists are "not eligible for pay or promotion" (10 U.S.C. 273(c)). Active-status Standby Reservists may earn retirement credit while on voluntary training, and they are eligible for promotion below the general or flag-officer grades. Department of Defense Directive 1215.6 section IV, E, 4 and IV, F, 3 (June 12, 1971); Department of Defense Directive 1235.9, section IV, A, 5 (September 13, 1967).

[12] Limitations on the discharge of Reserve commissioned officers are found in 10 U.S.C. 1161(a) and (b), 1163(a) and (b).

The courts below in deciding that a commission in the Retired and Standby Reserves is an "Office under the United States" unduly expanded the constitutional bar in Article I, Section 6, Clause 2. Clearly a legislator cannot simultaneously hold a cabinet office or a seat on the judiciary, which would permit him both to pass legislation and to enforce or interpret it. Nor could he hold a commission in the Regular Army, which would suggest continuous military duties and a permanent tie to the Executive Branch of government.[13] But a commission in the Retired or Standby Reserves is significantly different. As one commentator recently noted, such a commission, "with its intermittent, noncontinuous duties and its limited relationship with the executive branch, seems neither inherently repugnant to the congressional office nor an encroachment on the independence of the legislative branch." Note, *Reservists in Congress*, 50 Tex. L. Rev. 509, 513 (1972). To characterize it as an "Office under the United States" is, we submit, contrary both to the letter and spirit of Article I, Section 6, Clause 2.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

HARLINGTON WOOD, JR.,
Assistant Attorney General.

MORTON HOLLANDER,
LEONARD SCHAITMAN,
Attorneys.

FEBRUARY 1973.

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[13] See 6 Cannon, *supra*, at p. 66. Compare H. Rep. No. 2205, 53th Cong., 3d Sess., pp. 33, 64.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[No Opinion]

SEPTEMBER TERM, 1972

CIVIL ACTION NO. 1429-70

No. 71-1535

RESERVISTS COMMITTEE TO STOP THE WAR, ADAM HOCHSCHILD, ERNEST NOTAR, BRUCE PHILLIPS, DAVID L. KRANZ AND GEORGE HOLMES

v.

MELVIN R. LAIRD, *Secretary of Defense,* STANLEY R. RESOR, *Secretary of the Army,* JOHN H. CHAFEE, *Secretary of the Navy,* AND ROBERT C. SEAMANS, JR., *Secretary of the Air Force,* APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: SOBELOFF,* Senior Circuit Judge, and WRIGHT and ROBINSON, Circuit Judges.

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*Of the Fourth Circuit, sitting by designation pursuant to 28 U.S.C. 294(d) (1970).

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the judgment of the District Court appealed from in this cause is hereby affirmed on the basis of the memorandum opinion of the District Court. *Reservists Committee to Stop the War* v. *Laird*, D. D.C., 323 F. Supp. 833 (1971). We are also of the view that plaintiffs have the requisite standing and that their claim is judicially enforceable under the rationale of *Flast* v. *Cohen*, 392 U.S. 83 (1968), and *Baker* v. *Carr*, 369 U.S. 186 (1962).

Per Curiam

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1429-70

RESERVISTS COMMITTEE TO STOP THE WAR, ET AL., PLAINTIFFS

v.

MELVIN LAIRD, ET AL., DEFENDANTS

MEMORANDUM OPINION

This case presents the discrete question whether under Article I, Section 6, Clause 2 of the Constitution of the United States a person may at the same time be a member of Congress and hold a commission in the Armed Forces Reserve. The meaning and effect of this constitutional provision have never before been determined by a court. There is no factual dispute, and the legal issue has been tendered on cross-motions for summary judgment and has been fully briefed and argued.

Article I, Section 6, Clause 2 of the Constitution reads in its entirety as follows:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such Time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Plaintiffs ask the Court to implement this constitutional requirement by declaratory judgment and by injunction against the Secretary of Defense and the Secretaries of

the Army, Navy, and Air Force, upon the undisputed showing that at the present time 117 Senators and Representatives hold commissions in the Army, Navy, Air Force or Marine Corps. Reserves subject to the rights and duties of reservists as specified in 10 U.S.C. chs. 11 and 39. This action does not seek to remove any Congressman from his elected office, nor to declare that any Congressman lacks the qualifications for the Senate or the House of Representatives. Rather it proceeds on the assumption that the Executive branch can be directed to take steps that will eliminate any office inconsistent with the constitutional mandate.

Initially a determination must be made as to whether plaintiffs have standing to bring this action. The issue then becomes whether a commission in the Reserve is an "office under the United States." For reasons that will appear, the Court is satisfied that plaintiffs have the requisite standing, and a determination is thus required whether a Reserve commission is within the ambit of "office" as that term is used in the Constitution. Because the Clause must be considered on the merits and its meaning and effect has some bearing on resolution of the standing question, the Court will first consider the merits before turning to a more detailed discussion of the justiciability of the controversy and the nature of the relief that shall be granted in this case.

I. *The Meaning and Purpose of the Clause*

At the outset it will assist an understanding of the issues here presented to review briefly the origin and intended meaning of the constitutional provision this litigation puts into focus. The sources of this review are primarily the proceedings of the Constitutional Convention and certain passages in the Federalist Papers.

The wording of the Clause as reported to the Constitutional Convention by the Committee of Detail was as follows:

> The members of each House shall be ineligible to, and incapable of holding any office under the authority of the United States, during the time for which they shall respectively be elected: and the members of the Senate shall be ineligible to, and incapable of holding any such office for one year afterwards.*

It will be noted that this clause contained two distinct prohibitions: one against the simultaneous holding of incompatible offices, and the other against the appointment of a member of Congress to executive office during the term for which he was elected and, in the case of Senators, for one year thereafter.

The wisdom of the "incompatibility clause," barring the simultaneous holding of executive and legislative office, was universally accepted throughout the debates in the Convention. The discussion turned around the desirability of the "ineligibility clause," which prohibited a member of either House from resigning his legislative duties to accept executive office. While this discussion was therefore a bit tangential to the key issue presented here—that of the incompatibility of offices—it is highly informative as to the true meaning and purpose of that portion of the final Article which directs that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

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*2 Farrand, Records of the Federal Convention of 1787, at 180 (1911). A similar provision in the Randolph Resolutions, or Virginia Plan, would have barred members of Congress from both federal and state offices. 1 *id.* at 20.

This clause had its origin in a strong belief by the Framers in the principle of separation of powers, and a desire to avoid the example of England, where, the Framers believed, elected officials had been subverted by appointments to office by the Crown. This view had such strength that strong objections were raised to weakening the original proposal by amendment in any respect.

A few of many instances may be cited to give the flavor of the debates. Elbridge Gerry warned:

> It appears to me, that we have constantly endeavored to keep distinct the three branches of government; but if we agree to this motion, it must be destroyed by admitting the legislators to share in the executive, or to be too much influenced by the executive, in looking up to him for offices. (1 Farrand at 393.)

To a suggestion that "in this instance we refine too much," Mr. Butler responded:

> We have no way of judging mankind but by experience. Look at the history of the government of Great Britain, where there is a very flimsy exclusion—Does it not ruin their government? A man takes a seat in parliament to get an office for himself or friends, or both; and this is the source from which flows its great venality and corruption. (1 Farrand at 379.)

Mr. Mason was also conscious of the British experience:

> I admire many parts of the British constitution and government, but I detest their corruption. Why is the power of the crown so remarkably increased the last century? A stranger, by reading their laws, would suppose it considerably diminished; and yet, by the sole power of appointing the increased officers of government, corruption pervades every village in the kingdom. If such a restriction should abridge the right

> of election, it is still necessary, as it will prevent the people from ruining themselves; and will not the same causes here produce the same effects? I consider this clause as the cornerstone on which our liberties depend—and if we strike it out we are erecting a fabric for our destruction. (1 Farrand at 380-381.)

In response to one amendment offered to weaken the eligibility clause, Colonel Mason "ironically proposed to strike out the whole section, as a more effectual expedient for encouraging that exotic corruption which might not otherwise thrive so well in the American soil." 2 Farrand at 284.

Alexander Hamilton eloquently underlined the essentiality of barring Congressmen from holding other office while they retained their membership, even while arguing against further exclusions:

> I confess there is danger where men are capable of holding two offices. Take mankind in general, they are vicious—their passions may be operated upon. [But] we have been taught to reprobate the danger of influence in the British government, without duly reflecting how far it was necessary to support a good government . . . Our prevailing passions are ambition and interest; and it will ever be the duty of a wise government to avail itself of these passions, in order to make them subservient to the public good—for these ever induce us to action. Perhaps a few men in a state, may, from patriotic motives, or to display their talents, or to reap the advantage of public applause, step forward; but if we adopt the clause, we destroy the motive. I am therefore against all exclusions and refinements, except only in this case: that when a member takes his seat, he should vacate every other office. (1 Farrand at 381-382.)

The result of the debates was a compromise, first proposed by Madison and later slightly modified. It maintained inviolate the incompatibility of the offices, and limited the ineligibility provision governing offices Congressmen on resignation could accept to offices created or the emoluments of which were increased by Congress during the member's term in office. The purpose of the provision was succinctly stated by Madison in the Federalist No. 76, where in discussing the possibility of collusion between the President and the Senate on executive appointments, he quoted the entirety of Article I, Section 6, Clause 2, in its final form, as establishing "important guards against the danger of executive influence upon the legislative body . . ."

Significantly, some of those who had argued against the original broad exclusion were specifically concerned with the availability of the membership for military service. James Wilson, for example, feared "the fatal consequence in time of war, of rendering perhaps the best Commanders ineligible." 1 Farrand at 376. Gouverneur Morris agreed, and proposed an exception for offices in the Army and Navy. 2 *id.* at 286, 289. It was perhaps these considerations which led to the compromise which in effect permitted Congressmen to resign and accept certain military or other offices.

Thus the Clause has consistently declared an incompatibility of legislative and executive or judicial offices, rather than a standing qualification (such as age, citizenship or residency) for membership in Congress. It was designed to ensure the integrity of a particular form of government, by preventing encroachments upon the separation of powers; and any violation of the Clause was seen to injure all citizens of the United States, rather than a particular group or the constituents of a particular Congressman.

II. *Status of Reserve Officers under the Clause.*

Against this background the Court turns to a consideration of the controversy over whether a commission in the Reserve is an "office under the United States." Plaintiffs sought extensive discovery into Pentagon files to determine the extent of the activities of each Congressman in the Reserve to develop his perquisities from and duties toward the Executive resulting from his commission, with particular attention to those members who have long served as members of the Armed Services Committees of the House and Senate. The Court refused to permit such inquiries. The question of whether or not a Reserve commission is "an office under the United States" can be resolved on the basis of the controlling statutes and decisions, without more, since a showing of actual favoritism or conflict of interest is not necessary to effectuate the purpose of the Clause.

The Reserve is divided in "Ready," "Standby," and "Retired" components. With a single exception, all Congressmen in the Reserve are classified in either Standby or Retired Reserve components.* Congressmen in Standby status do not receive pay, but may elect to

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*There are, in addition, two Congressmen who hold commissions in the Army National Guard. Though the Army National Guard is a "Reserve component," 38 U.S.C.§ 101(27), and its officers are "federally recognized," 32 U.S.C. §§ 307, 310, appointments to office in the Guard are made by the governors of the various states. The Secretary of Defense and the other defendants, therefore, do not have the power to remove the commissions of those Congressmen who are officers in the Guard, and no cause of action is stated with respect to those two Congressmen. No determination is made herein as to whether a commission in the National Guard is an "office under the United States" for purposes of Article I, section 6 of the Constititution.

participate in training and earn promotion and retirement credits. Congressmen in Retired Reserve may receive pay if otherwise eligible, though fewer than twenty do so. All members of the Reserve, including those in Retired status, are subject to call to active duty without their consent in time of war or national emergency.

The term "office" was defined in *United States* v. *Hartwell,* 6 Wall. (73 U.S.) 385, 393 (1867), as "a public station, or employment, conferred by the appointment of Government. The term embraces the ideas of tenure, duration, emoluments, and duties." The question whether a commission in the 1916 National Guard fit this definition was considered at length by the House Committee on the Judiciary. After outlining the status and duties of an officer in the Guard and reviewing the legislative precedents with respect to Congressmen whose seats were declared vacant by virtue of their acceptance of an Army or Militia commission, the Committee concluded that a Congressman was not entitled to hold a commission in the National Guard. H.R. Rep. No. 885, 64th Cong., 1st Sess. (June 29, 1916). A commission in the modern Armed Forces Reserve cannot fairly be distinguished from a commission in the 1916 National Guard for purposes of Article I, Section 6, Clause 2.* The question is, therefore, whether the reasoning of the Committee, consistent with the holding of the Supreme Court, was erroneous, or

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*Much like the 1916 National Guard, officers of the Reserve are subject to call and assignment by the President; their salaries and expenses are paid from federal funds; they are subject to the Uniform Code of Military Justice while on duty or while in Retired status; they enlist for definite terms; and they subscribe to the oath of office required of all civil servants. Unlike the Guard, Reserve officers are appointed by the President and retain their commissions at his pleasure.

whether subsequent events or rulings render it an anachronism. It is clear that such is not the case.

Defendants rely primarily on 5 U.S.C. § 2105(d), enacted in slightly different form in 1930. It reads:

> A Reserve of the armed forces who is not on active duty or who is on active duty for training is deemed not an employee or an individual holding an office of trust or profit . . . under . . . the United States because of his appointment, oath, or status, or any duties or functions performed or pay or allowances received in that capacity.

Were this statute intended by Congress to exempt Reserve officers from the terms of Article I, Section 6 of the Constitution, that determination should receive careful consideration by the Court. The legislative history of the statute, however, precludes such an interpretation. In the exceedingly brief floor debate on the bill, Senator Couzens suggested that it was an attempt to remove a Reserve officer from the definition of "office" as used in the Constitution, but admitted that the Chairman of the Military Affairs Committee, Senator Reed, "doubts whether this proposed legislation will remedy the situation." 72 Cong. Rec. 11881, 71st Cong., 2d Sess. (June 27, 1930). Senator Walsh then objected to the bill as "too sweeping." When the bill came to a vote later in the day, Senator Reed reported that he had had time to explain the bill to Senator Walsh, and that Walsh "had no further objection." *Id.* at 11892. The narrow purpose of the bill was explained in the House committee report, which stated that the statute was enacted "to remedy a condition occasioned by a ruling of the Attorney General that prevents Reserve officers, who are attorneys at law, from practicing before the Treasury Department or from performing other work that the law forbids officers of the

Government to undertake." H. R. Rep. No. 1884, 71st Cong., 2d Sess., at 2 (1930).

Defendants also cite *Simmons* v. *United States*, 55 Ct. Cl. 56 (1920), for the proposition that a Reserve officer is not an "officer under the United States." In that case, the Court of Claims granted the motion of an attorney who was a Reserve officer for leave to prosecute a claim in that court against the United States, despite the provisions of Section 5498 (now 18 U.S.C. § 205) which barred officers of the United States from doing so. This decision was in accord with the later determination of Congress embodied in 5 U.S.C. § 2105(d), but like that statute, had no effect on the scope or interpretation of the constitutional bar against Congressmen holding incompatible offices.

Implicit in the *Simmons* case and the 1930 statute is undoubtedly a recognition of the limited nature of the relationship between the Executive branch and a private citizen who may be an inactive Reserve officer. Where Congress is concerned, however, the incompatibility clause must be applied in light of the purpose of the Framers, who erected an inflexible barrier against Congressmen holding or being appointed to any other office under the United States. Moreover, given the enormous involvement of Congress in matters affecting the military, the potential conflict between an office in the military and an office in Congress in not inconsequential.* The words of the House Committee on the Judiciary in 1916 have lost none of their force:

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*It is relevant in this connection to note that while less than one-fourth of the members of the 91st Congress were Reserve officers, those members were disproportionately represented on the Committees concerned with military affairs. Reserve officers constituted more

It may be claimed, however, by some that under the Act of Congress federalizing the militia of the several States there are numerous small offices created of little importance, and, therefore, outside of the intent of the framers of this clause of the Constitution. But no line can be drawn between the large and small office. The Constitution prohibits a Member of Congress from holding "any" office under the United States while a member of either House. If a Member should hold any office under the United States, the prohibition of the Constitution at once intervenes and declares that he shall not "be a Member of either House."

III. *Standing.*

The issue now before the Court has remained unresolved these many years in part because of earlier concepts in the law that rigidly restricted standing to sue. In recent years the Supreme Court has greatly expanded the concept of standing and in this Circuit the concept has now been almost completely abandoned. A review of the decisions is appropriate in view of defendants' vigorous challenge on the basis of lack of standing.

Many of the technicalities which historically surrounded the concept of standing were cleared away by the Supreme Court in *Flast* v. *Cohen*, 392 U.S. 83 (1968). The Court focused the question of standing in the constitutional sense upon "whether the dispute sought to be adjudicated will be presented in an adversary context and in a form

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than half the membership of the Senate Armed Services Committee (including one Major General in the Army Reserve, retired with pay, who was President of the Reserve Officers' Association); one-third of the House Armed Services Committee and two-thirds of the House Veterans Affairs Subcommittee on Compensation and Pension.

historically viewed as capable of judicial resolution." *Id.* at 101. An adversary context was said to be ensured where the complainants have "a personal stake in the outcome of the controversy." In many cases, that personal stake is readily apparent, as where a corporation alleges economic injury from unfavorable agency action, or where members of a minority group allege discrimination in the allocation of government services. In other cases, however, the nature of the alleged injury is diffuse or intangible. In a long series of cases prior to *Flast*, where the personal stake and injury were not apparent, this circumstance was sufficient to deny standing to individual citizens and thus effectively to preclude judicial review of a challenged action.

The Court in *Flast*, however, abandoned the requirement of a significant demonstrable injury to the plaintiff and substituted a test designed to ensure that the plaintiff, despite the generality of his alleged injury, is a "proper and appropriate party to invoke a federal court's jurisdiction." 392 U.S. at 103. The test announced is "whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Id.* at 102. If this test is satisfied, the Court said, a complainant has standing in the sense that his claim presents a "case or controversy" under Article III of the Constitution.

The question of standing still involves what the Supreme Court has termed a "rule of self-restraint" designed to avoid passing on premature or ill-focused constitutional claims. *Barrows* v. *Jackson*, 346 U.S. 249, 255 (1953). The latest expression of such a "rule" is found in *Ass'n of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153 (1970). The Court there noted that the question of standing concerns not only the "case" or "controversy" test, but "the question

whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."

Plaintiffs—an association of present and former Reservists organized to oppose the war in Vietnam, and five individual members of that organization—purport to represent several different "classes" in this action. Standing is claimed as Reservists, as persons opposed to the Vietnam War, as taxpayers and as citizens. Only their status as citizens gives standing in this case. Plaintiffs in their capacity as Reservists allege that they are injured by favoritism toward Congressmen in assignments, promotion, and perquisites within the Reserves. No evidence has been offered in support of this claim. The Court barred discovery on the question. Even were these allegations proved, it is doubtful whether plaintiffs' interests as Reservists are within the zone of those interests which the Clause was designed to protect. Nor is plaintiffs' opposition to the war in Vietnam sufficient to give standing in this case. That controversy is irrelevant to the issues presented, and the Court rejects any suggestion that the relief requested can responsibly be said to have any bearing whatsoever on the outcome of that controversy.

Plaintiffs' standing as taxpayers must also fail under *Flast* v. *Cohen, supra,* for the constitutional provision which they invoke cannot fairly be construed as a limitation on the taxing and spending power of Congress. The Clause here in issue is a limitation on the right of Congressmen to hold other offices which are incompatible under the separation-of-powers doctrine. While Congressmen in their positions as Reservists also receive funds from the public treasury, it is not the expenditures thus incurred, but the possibility of undue Executive influence over the

Congress, which the Constitution seeks to forbid. Plaintiffs' claim in no way depends upon the fact that some Congressmen receive pay as Reservists, and hence there is not that "logical nexus" between the status [of taxpayers] and the claim sought to be adjudicated" which is required by *Flast*.

Plaintiffs do, however, have standing to sue in their capacity as citizens of the United States. There are undoubtedly very few instances in which plaintiffs who assert merely the undifferentiated interest of citizens have a personal stake in the outcome sufficient to support standing in the constitutional sense.* Several considerations move the Court to hold that plaintiffs have standing as citizens in this instance. First, while any injury which might result from Congressmen holding Reserve commissions is hypothetical, the hypothesis is not concocted by plaintiffs but underlies the constitutional provision itself. Like a conflict-of-interest statute, the constitutional bar addresses itself to the potential for undue influence rather than to its realization. *Cf. Board of Governors* v. *Agnew*, 329 U.S. 441, 449 (1947). The Court will not lightly conclude that a constitutional provision so highly regarded and hotly debated by the Framers serves no real purpose.

Second, the issue tendered is a narrow one and involves a precise self-operative provision of the Constitution. This is not a case where plaintiffs seek "to employ

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*There have been suggestions that a challenge to governmental action in violation of the Establishment Clause might be such a case. *See Flast v. Cohen, 392 U.S. 83, 115-116 (1968) (Fortas, J., concurring); Flast v. Gardner, 271 F. Supp. 1, 8 (S.D.N.Y. 1967) (Frankel, D.J., dissenting); Committee for Public Education and Religious Liberty v. Rockefeller, 39 U.S.L.W. 2958 (S.D.N.Y. Jan. 28, 1971). But see* Lemon v. Kurtzman, 310 F. Supp. 35 (E.D. pa. 1970).

a federal court as a forum in which to air [their] generalized grievances about the conduct of government or the allocation of power in the Federal System." *Flast* v. *Cohen, supra,* at 106.

Third, the interest in maintaining independence among the branches of government is shared by all citizens equally, and since this is the primary if not the sole purpose of the bar against Congressmen holding executive office, the interest of plaintiffs as citizens is undoubtedly one which was intended to be protected by the constitutional provision involved.

Finally, there can be no doubt that this is a "case or controversy" in the common meaning of those words; the parties sharply conflict in both their interests and their views, and the case was ably briefed and argued. It is not irrelevant to note that if these plaintiffs cannot obtain judicial review of defendants' action, then as a practical matter no one can.*

IV. *Other Contentions as to Justiciability.*

The Government also contends that the constitutional prohibition against Congressmen holding executive office states only a qualification for membership in Congress, not a qualification for executive office. From this premise, it is concluded that no cause of action lies against the Secretary of Defense or other executive officials to

*Defendants suggest that the proper procedure to test the legality of a Congressman's commission in the Reserves is *quo warranto.* Such a procedure could be invoked only by an individual who claims title to the same position held by a Congressman. It is clear that, even if the holding of executive office be deemed a disqualification which can be asserted against a Congressman in *quo warranto,* the contingency of such a suit is remote and is unrelated to the question whether a general public interest is being harmed by the challenged practice of allowing Congressmen to hold Reserve commissions.

remove Congressmen from their offices in the Reserve; the only remedy under the provision is to remove the Reserve officer from his seat in Congress, and since each House is "the Judge of the Qualifications of its own Members" (Article I, Section 5), no remedy may be sought in any court. If the Government were correct in its initial premise, the case would seem to present a nonjusticiable "political question," in that there would exist "a textually demonstrable constitutional commitment of the issue to a coordinate political department. . . ." Baker v. *Carr*, 369 U.S. 186, 217 (1962).*

In support of their argument, defendants point first to the wording of the Clause itself, which makes a "Person holding any Office" ineligible to sit in Congress, and further suggest that the change in wording from the clause as originally reported to the Convention—making members of either House "ineligible to and incapable of holding any office"—indicates that the Framers intended for enforcement of the provision to come exclusively through removal of an officer from his seat in Congress. However, the records of the Convention, as previously discussed, reveal that the Clause was intended simply to declare the incompatibility of a seat in Congress and an office in the Executive or the Judiciary. Though the first part of what is now Article I, Section 6, Clause 2—dealing with the

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*In Powell v. McCormack, 395 U.S. 486 (1969), the Supreme Court noted that a House determination as to whether a member possessed the three "standing qualifications" for Congress (age, citizenship, and residency) might well be insulated from judicial review by the political question doctrine. The Court raised but did not reach the question whether the bar against Congressmen holding other offices under the United States is a "qualification" of which each House is the sole judge under Article I, Section 5. The question is answered in the affirmative by one commentator. Dionisopoulos, A Commentary on the Constitutional Issues in the Powell and Related Cases, 17 J. Pub. Law 103, 115 (1968).

eligibility of Congressmen for appointment to executive office—was debated at length, the part which declared the incompatibility of the offices was never questioned. The final wording of the Clause was drafted by the Committee of Eleven to whom the provision had been referred after the debate on Madison's compromise. 2 Farrand at 483. There is no indication that its changes were intended to have any effect on the substance of the incompatibility provision.

Defendants underline their argument by reference to the examples of Congressional enforcement of the constitutional provision in the Nineteenth and early Twentieth Centuries.* In each of these instances, however, it appears that the member whose seat was declared vacant had accepted a commission during his term in office. The Court's attention has not been directed to any case in which an elected Congressman was not seated by reason of an office he held at the time he first entered Congress; the congressional precedents involve members whose seats were declared vacant upon their acceptance of an appointment to another office while serving in Congress. It is the general rule that in the case of incompatible offices, "acceptance of the second office vacates the first." *Right of a Representative in Congress to Hold Commission in National Guard,* H.R. Rep. No. 885, 64th Cong., 1st Sess., at 4 (1916). Thus it is clear that defendants, as the superiors of Reserve officers within

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*Examples of cases in which Senators and Representatives were expelled from Congress upon their acceptance of military office may be found in 1 Hind's Precedents of the House of Representatives, §§ 486-499 (1907), and 6 Cannon's Precedents of the House of Representatives, §§ 60-64 (1936). Congress has also on occasion solicited the opinion of the Attorney General with respect to individual cases arising under the Clause. See, *e.g.*, 40 Ops. Att'y Gen'l 201 (1943); 40 Ops. Att'y Gen'l 301, 303 (1949).

the Executive branch, have the right and the power to remove Congressmen from the Reserve offices they held at the time of their election, and that their failure to do so is subject to judicial review.

There is no basis for defendants' contention that the issue of a Congressman's entitlement to hold executive office has been committed by the Constitution to either the Legislative or the Executive departments. Undoubtedly, Article I, Section 5 commits to Congress the decision whether any individual is qualified to sit in Congress, but this does not bar judicial consideration of the question whether executive action must be taken to carry out a constitutional mandate.

v. *Relief.*

Plaintiffs are entitled upon the Court's finding to a declaratory judgment that Article I, Section 6 prohibits any Congressman from holding a commission in the Armed Forces Reserve during his term in office. It does not follow, however, that injunctive relief is necessarily appropriate. See *Powell* v. *McCormack*, 395 U.S. 486,499 (1969). In considering the prayer for an injunction, the Court must take into account the importance of its action to persons not before the Court, and the fact that any resolution of the matter must necessarily involve coordinate branches of the Government. A number of factors impel the Court to deny injunctive relief in this case.

Congressmen have held commissions in the Reserve for a number of years, and though the matter has occasionally troubled both the Department of Defense and some members of Congress, the right of Congressmen to

hold commissions has not been clarified.* In the absence of an urgent necessity, and none is shown, the Court is loathe to take injunctive action which might prejudice the rights of Congressmen now seated who in some cases have been members of the Reserve for many years and may leave Congress at the end of their present terms. There is more than one way to remove the incompatibility. Individual Congressmen should be free to make their own choice. In any event, if the issue of incompatibility is finally determined on appeal consistent with the decision, there is no reason to believe that Congress and the Executive will be unable to accomodate themselves voluntarily to the decision, and to phase out incompatibility having due regard for the special status of Congressmen then seated.

An order granting the prayer for a declaratory judgment and denying injunctive and other relief requested by plaintiffs is attached.

GERHARD A. GESELL
United States District Judge

APRIL 2 1971.

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*See the remarks of Senator Goldwater, 109 Cong. Rec. 13211-14 (1963). Senator Goldwater's proposal that the Senate investigate and rule upon the question was not accepted. The Department of Defense has several times issued special directives concerning the status of Congressmen in the Reserve, but has never suggested that they resign their commissions.

In the United States District Court
for the District of Columbia

Civil Action No. 1429-70

RESERVISTS COMMITTEE TO STOP THE WAR, ET AL.,
PLAINTIFFS,

v.

MELVIN LAIRD, ET AL., DEFENDANTS.

ORDER

Upon consideration of cross-motions for summary judgment, the memoranda filed in support thereof, and the oral argument of counsel, and the Court having this day filed a Memorandum Opinion containing its conclusions of law based on the undisputed facts, it is this 2 day of April, 1971,

ORDERED that plaintiffs' motion for summary judgment is granted as to the claim for a declaratory judgment, and it is hereby declared that Article I, Section 6, Clause 2 of the Constitution renders a member of Congress ineligible to hold a commission in the Armed Forces Reserve during his continuance in office; and it is further

ORDERED that plaintiffs' motion is denied, and defendants' motion is granted, as to all claims for relief other than such declaratory judgment; as to these claims the complaint is dismissed.

GERHARD A. GESELL
United States District Judge

APPENDIX C

In the
United States District Court
for the District of Columbia

RESERVISTS COMMITTEE TO STOP THE WAR
P.O. Box 4398
Berkely, California 94704

ADAM HOCHSCHILD
2711 Virginia Street
Berkeley, California 94709;

ERNEST NOTAR
2541 Regent Street
Berkeley, California 94704;

BRUCE PHILLIPS
2131 Blake Street
Berkeley, California 94704;

DAVID L. KRANZ
675 Creston Road
Berkeley, California 95708

GEORGE HOLMES
5964 Racine Street
Oakland, California 94609,

PLAINTIFFS,

v.

MELVIN R. LAIRD, Secretary of Defense
The Pentagon
Washington, D.C. 20301;

STANLEY R. RESOR, Secretary of the Army
The Pentagon
Washington, D.C. 20301;

JOHN H. CHAFFE, Secretary of the Navy
The Pentagon
Washington, D.C. 20301;

ROBERT C. SEAMANS, JR., Secretary of the Air Force
The Pentagon
Washington, D.C. 20301,

DEFENDANTS.

COMPLAINT FOR INJUNCTION DECLARATORY JUDGMENT AND ORDER IN THE NATURE OF MANDAMUS

1. This is an action against the Secretary of Defense and the three service Secretaries to compel them to strike from the rolls of the United States Army, Navy, Air Force, Coast Guard and Marine Corps Reserves and the army and Air National Guard (the Reserves) all members of the United States Senate and House of Representatives presently listed as members of the Reserves, and for a declaratory judgment that such membership is an office under the United States that Article I, section 6, clause 2 of the United States Constitution prohibits members of Congress to hold.

Jurisdiction and Venue

2. This action arises under Article I, section 6, clause 2 of the United States Constitution. This Court has jurisdiction under 28 U.S.C. 1331, 1361, and 2201, and 11 D.C. Code 521. Venue of this action is the District of Columbia by reason of the official residence of all the defendants therein.

Plaintiffs

3. Plaintiff Reservists Committee to Stop the War (Committee) is a national unincorporated association of present and former officers and enlisted members of the Reserves, organized for the purpose of opposing the miltary involvement of the United States in Vietnam and of using all lawful means to end that involvement, including efforts by its members individually to persuade the Congress of the United States and all members of the Congress to take all steps necessary and appropriate to end that involvement. It brings this action on its own behalf and on behalf of all of its members and of all other citizens of the United States who share its views and aims. Committee has its headquarters in and is a resident of California.

4. Plaintiff Adam Hochschild is co-chairman of the Reservists Committee to Stop the War.

5. Plaintiff Ernest Notar is an officer in the Reserves, specifically the Naval Reserve, and is in active Ready Reserve status.

6. Plaintiff Bruce Phillips is an enlisted member of the Reserves, specifically the Air Force Reserve, and is in active Ready Reserve status.

7. Plaintiff David L. Kranz is an officer in the Reserves, specifically the Naval Reserve, and is in active Ready Reserve status; but on June 3, 1970, he expects to be transferred to inactive Standby Reserve status.

8. Plaintiff George Holmes is an enlisted member of the Reserves, specifically the Army Reserve, and is in active Ready Reserve status.

9. All the individual plaintiffs are United States citizens and taxpayers and are residents of California. All share the views and aims of and are members of the Committee.

Class Action

10. This is a class brought by the plaintiffs on their own behalf and on behalf of all others similarly situated pursuant to Rules 23(a) and 23(b)(1) and (2), F.R. Civ.P.

(a) The class represented by plaintiff Committee, its members and the named individual plaintiffs together consists of persons opposed to the United States military involvement in Vietnam and purposing to use lawful means, including communication with and persuasion of members of Congress, to end that involvement. . .

(b) The classes represented by the named individual plaintiffs alone consist of (i) all officers and enlisted members of the Reserves who are not members of Congress and (ii) all citizens and taxpayers of the United States.

11. Each of the classes described in paragraph 10 of this complaint is so numerous that joinder of all members is impracticable; (2) there are questions of law or of fact common to the class; (3) the claims of the representative parties are typical of the claims of the class; (4) the representative parties will fairly and adequately protect the interests of the class; (5) the parties opposing the class have acted on grounds generally applicable to the class; (6) the prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications; and (7) questions of law and fact common to members of the class predominate over any questions affecting only individual members so that a class action is superior to other available methods for the fair and efficient adjucation of the controversy.

Defendants

12. Defendant Laird is the Secretary of Defense of the United States with administrative authority, under the president as Commander in Chief, over the Armed Forces of the United States, including the Reserves.

13. Defendants Resor, Chafee and Seamans are the Secretaries of the Army, Navy and Air Force, respectively, with administrative authority, under the President as Commander in Chief and under the Secretary of Defense, over the armed services within their respective jurisdictions, including the respective Reserves.

14. The official residence of all the defendants is the District of Columbia.

Rights and Interests of Plaintiffs

15. Plaintiff Committee and the named individual plaintiffs and the class they represent have an interest in, a right to and are deprived by the membership in the Reserves of members of Congress of, unbiased consideration by the Congress and its members of their efforts to communicate and persuade the Congress and its members to take action, including voting on germane proposed legislation and resolutions, that may promote their objective of ending the military involvement of the United States in Vietnam.

16. The named individual plaintiffs and the classes they represent

(a) as members of the Reserves who are not members of Congress, have an interest in, a right to, and are deprived of equality of treatment with members of the Reserves who are members of Congress, in respect of

(i) assignments for active duty for training;
(ii) liability for call to active duty in time of war or other emergency; and
(iii) promotion;

(b) as members of the Reserves have an interst in, a right to and are deprived by the membership in the Reserves of members of Congress of, unbiased consideration by the Congress and its members of military appropriations, resolutions approving or disapproving military action, and other measures before the Congress affecting or likely to affect members of the Reserves;

(c) as citizens and taxpayers of the United States have an interest in, a right to and are deprived by the membership in the Reserves of members of Congress of, the unbiased consideration by the Congress and its members of measures before the Congress affecting the military establishment and appropriations therefor, including appropriations for compensation and pensions for members of the Reserves, and measures relating to military action, war and peace.

Facts

17. As of April 16, 1970, there were two members of Congress in Ready Reserve status and 33 in active Standby Reserve status. These 35 attend drills or perform other active duty for training, and accumulate points for retirement pay entitlement under 10 U.S.C. 1332 and similar statutory provisions: as of April 16, 1970, there were 24 members of Congress in inactive Standby Reserve status. As of March 9, 1970, there were 63 members of Congress in Retired Reserve status.

18. Members of the Reserve constitute a dominant minority, in numbers much greater in proportion than

their numbers in proportion to the whole membership of the Senate and of the House of Representatives respectively, in the Armed Services Committees of the Senate and the House of Representatives; the Foreign Affairs Committee of the House of Representatives; the Veterans Affairs Subcommittee of the Labor and Public Welfare Committee of the Senate, and the Ways and Means Committee of the House of Representatives.

19. Defendants may, in their discretion as provided in 10 U.S.C. 672 and 674, order members of the Reserves, including members of Congress who are members of the Reserves, into active duty without their consent

(a) for the duration of any war or national emergency declared by Congress;

(b) at any time, for members of the Reserve in active status, for no more than 15 days a year.

20. Defendants may at any time, in their discretion as provided in 10 U.S.C. 681, release members of the Reserves, including members of Congress who are members of the Reserves, from active duty.

21. All commissioned officers in the Reserves below flag or general officer rank are appointed by the President alone; all commissioned officers in the Reserves of flag or general officer rank are appointed by the President with the advice and consent of the Senate; commissioned officers in the Reserves of all ranks serve during the pleasure of the President and may be discharged by him alone; all as provided in 10 U.S.C. 593.

22. Senators and members of the House of Representatives subscribe to the following oath of office:

I, , do solemnly swear(or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter: So help me God.

23. Members of the National Guard subscribe to an oath to "obey the orders of the President of the United States and of the Governor of the State of [name of state]", as provided in 32 U.S.C. 312.

24. On December 12, 1965, defendant Laird's predecessor as Secretary of Defense issued a directive transferring all members of Congress then in the Ready Reserve to the Standby Reserve; but permitting those with a remaining statutory military obligation, or with more than 18 but less than 20 years of service toward retirement, to continue to participate voluntarily in Reserve training.

25. On May 22, 1969, defendant Laird authorized all persons, including members of Congress, transferred to the Standby Reserve by the directive referred to in paragraph 24, to be assigned, at their request, to the Active status list of the Standby Reserve, to participate in training and to earn training points creditable for promotion and retirement.

First Cause of Action

26. Membership in the Reserves, whether active, inactive or retired, whether as an officer or as an enlisted member, whether paid, unpaid or with the possibility in the future of payment for Reserve duty or for retire-

ment, is an office under the United States within the meaning of Article I, section 6, clause 2 of the United States Constitution, and members of Congress are prohibited by that clause from holding such membership.

27. Such membership in the Reserves is incompatible with membership in Congress and is prohibited by Article I, section 6, clause 2 of the United States Constitution.

28. Such membership in the Reserves subjects a member of Congress who is also such a member of the Reserves to the possibility of influence and/or retaliation by the President, by the defendants or by other members of the executive branch, in violation of the independence of the Congress established by Article I of the United States Constitution.

29. Such membership in the Reserves places upon a member of Congress who is also such a member of the Reserves possible inconsistent obligations that may require him to violate his duty faithfully to perform one office or the other.

30. Such membership in the Reserves has induced and/or may induce members of Congress who are also such members of the Reserves to vote and to influence other members of Congress to vote more favorably than otherwise to the wishes of defendants, other members of the military establishment, including members of the Regular armed forces, and/or military or defense contractors, on measures affecting the military establishment and appropriations therefor, military or defense contracts, active and retired military pay, measures affecting the Reserves and members thereof, and measures affecting war, peace and military action by the United States.

31. Membership in the National Guard requires subscription to an oath to obey the orders of the President

and of the Governor of a state, which is inconsistent with the oath of members of Congress prescribed in 5 U.S.C. 3331, taken pursuant to 2 U.S.C. 21, 25.

32. Such membership in the Reserves by members of Congress thereby deprives or may deprive the individual named plaintiffs and all other citizens and taxpayers of the United States of the faithful discharge by members of Congress who are members of the Reserves of their duties as members of Congress, to which all citizens and taxpayers are entitled.

SECOND CAUSE OF ACTION

33. Such membership in the Reserves by members of Congress thereby deprives or may deprive the individual named plaintiffs and all other members of the Reserves of rights, privileges and benefits to which they otherwise are or may be entitled; or may subject them to call for active duty, including combat duty placing them in danger of life and limb, to which they otherwise would not be subject.

THIRD CAUSE OF ACTION

34. Defendants have in the past and may in the future treat members of Congress who are members of the Reserves more favorably than other members of the Reserves, including the individual named plaintiffs, in respect of assignments for active duty for training, call to active duty and promotion.

FOURTH CAUSE OF ACTION

35. Members of the Reserves who are also Senators may vote and may influence other Senators to vote in a manner more favorable than otherwise on the nomination of members of the Senate to be flag or general officers, to the prejudice of other members of the Reserves who

may be candidates for such rank, including the individual named plaintiffs.

FIFTH CAUSE OF ACTION

36. Membership in the Reserves of members of Congress effectively abridges the rights of plaintiffs Committee, the individual named plaintiffs and other persons opposed to the United States military involvement in Vietnam to petition the government for redress of grievances; in violation of the First Amendment to the United States Constitution.

RELIEF REQUESTED

37. Plaintiffs request that this Court

(a) issue an order in the nature of mandamus directed to defendants requiring them to remove from the rolls, lists, rosters or other documents within defendants' control, designating members of the Reserves and to discharge from the Reserves, all members of Congress who are officers or enlisted members of the Reserves; and requiring them to remove from such rolls, lists, rosters or other documents, and to discharge from the Reserves, any officer or enlisted member of the Reserves who shall thereafter become a member of Congress;

(b) permanently enjoin defendants and their successors from placing on such rolls, lists, rosters or other documents, or otherwise enrolling as an officer or enlisted member of the Reserves any member of Congress during his continuance in office as a member of Congress;

(c) declare that membership in the Reserves is an office under the United States that Article I, section 6, clause 2 of the United States Constitution prohibits members of Congress to hold and is incompatible with membership in the Congress; and

(d) issue an order in the nature of mandamus to defendants requiring them to take all action available under the law to reclaim from members of Congress and former members of Congress who have been members of the Reserves during their continuance in office as members of Congress, all active and/or retired Reserve pay that said members of Congress received during their continuance in office as members of Congress.

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1660 L Street, N.W.
Washington, D.C. 20036
Attorney for Plaintiffs

Jan. 24, 1973

APPENDIX D

MEMBERS OF 93d CONGRESS WHO ARE MEMBERS OF A RESERVE COMPONENT

Name	Service	Rank	State	Pay Status	Comments
		READY RESERVE			
Montgomery, Gillespie V.	Army NG	Col.	Miss.	Pay	
Saxbe, William B.	Army NG	Col.	Ohio	Non-pay	Inactive
		ACTIVE STANDBY			
Carey, Hugh L.	USAR	Col.	N.Y.	Non-pay	
Chappell, Bill, Jr.	USNR	Capt.	Florida	"	
Clark, Frank M.	USAFR	LTC	Penna.	"	
Corman, James C.	USMCR	LTC	Calif.	"	
Derwinski, E.J.	USAR	Maj.	Ill.	"	
Frey, Louis J.	USNR	Cdr.	Florida	"	
Fuqua, John D., III	USAR	Capt.	Florida	"	
Hansen, Orval H.	USAFR	Maj.	Idaho	"	
Hechler, Ken	USAR	Col.	W. Va.	"	
Hogan, Lawrence J.	USNR	Cdr.	Md.	"	
Hosmer, Craig	USNR	RAdm.	Calif.	"	
Mailliard, William S.	USNR	RAdm.	Calif.	"	
Murphy, John M.	USAR	LTC	N.Y.	"	
Pell, Clairborne	USCGR	Capt.	R. I.	"	
Roberts, Ray	USNR	Capt.	Texas	"	Dept. of Trans.
Satterfield, David E., III	USNR	Capt.	Va.	"	
Spence, Floyd D.	USNR	Capt.	S.C.	"	
Stratton, Samuel S.	USNR	Capt.	N.Y.	"	
Tower, John G.	USNR	BM 1	Texas	"	
Wilson, Bob	USMCR	LTC	Calif.	"	
Wylie, Chalmers P.	USAR	LTC	Ohio	"	
		INACTIVE STANDBY			
Beard, Robin L., Jr.	USMCR	Capt.	Tenn.	Non-pay	
Brasco, Frank J.	USAR	Capt.	N.Y.	"	
Chamberlain, Charles E.	USCGR	Capt.	Mich.	"	Dept. of Trans.
Dominick, Peter H.	USAFR	Col.	Colo.	"	
Hammerschmidt, John P.	USAFR	Maj.	Ark.	"	
Ichord, Richard H.	USAFR	Maj.	Missouri	"	
Inouye, Daniel K.	USAR	Maj.	Hawaii	"	
Myers, John T.	USAR	Maj.	Ind.	"	
Reid, Ogden R.	USAR	Capt.	N.Y.	"	
Smith, Neal E.	USAFR	Maj.	Iowa	"	
Talcott, Burt L.	USAFR	Maj.	Calif.	"	
Ullman, Al	USNR	Capt.	Oregon	"	

Name	Service	Rank	State	Pay Status	Comments
		RETIRED			
Beall, J. Glenn, Jr.	USNR	LtJG	Md.	Without pay	
Bevill, Tom D. F.	USAR	LTC	Ala.	" "	
Blackburn, Ben B.	USNR	LCdr.	Georgia	" "	
Blatnik, John A.	USAFR	Maj.	Minn.	" "	
Bolling, Richard W.	USAR	LTC	Missouri	" "	
Brock, W. E.	USNR	Lt	Tenn.	" "	
Brooke, Edward W.	USAR	Capt.	Mass.	" "	
Brooks, Jack B.	USMCR	Col.	Texas	" "	
Burleson, Omar	USNR	LCdr.	Texas	" "	
Church, Frank	USAR	Maj.	Idaho	" "	
Conable, Barber B., Jr.	USMCR	Col.	N.Y.	" "	
Davis, Glenn R.	USNR	Lt.	Wisconsin	" "	
Dickinson, W. L.	USAFR	Maj.	Ala.	" "	
Donohue, Harold D.	USNR	LCdr.	Mass.	" "	
Evins, Joe L.	USAR	Maj.	Tenn.	" "	
Fisher, O. Clark	USAFR	LTC	Texas	" "	
Flynt, John J., Jr.	USAR	Col.	Georgia	" "	
Fountain, Lawrence H.	USAR	LTC	N.C.	" "	
Frelinghuysen, Peter, H.B.	USNR	Lt.	N.J.	" "	
Fulton, Richard H.	USNR	Capt.	Tenn.	" "	
Gettys, Tom S.	USNR	LCdr.	S.C.	" "	
Gibbons, Sam M.	USAR	Maj.	Florida	" "	
Hart, Philip A., Jr.	USAR	Col.	Mich.	" "	
Hartke, Vance	USNR	Lt.	Ind.	" "	
Horton, Frank J.	USAR	LTC	N.Y.	" "	
Hunt, John E.	USAR	LTC	N.J.	" "	
Javits, Jacob K.	USAR	Col.	N.Y.	" "	
Jones, Robert E.	USNR	LtJG	Ala.	" "	
Long, Russell B.	USNR	Lt.	Louisiana	" "	
McCloskey, Paul N., Jr.	USMCR	Col	Calif.	" "	
McIntyre, Thomas J., Jr.	USAR	Maj	N.H.	" "	
MacDonald, Torbert N.	USNR	Lt	Mass.	" "	
Magnuson, Warren G.	USNR	LCdr	Wash.	" "	
Mann, James R.	USAR	Col	S.C.	" "	
Mathias, Charles McC., Jr.	USNR	Capt.	Md.	" "	
Matsunaga, Spark M.	USAR	LTC	Hawaii	" "	
Moorhead, Carlos, J.	USAR	LTC	Calif.	" "	
Pearson, James B.	USNR	LCdr.	Kansas	" "	
Reuss, Henry S.	USAR	LTC	Wisconsin	" "	
Rhodes, John J.	USAR	Col.	Ariz.	" "	
Robinson, James K.	USAR	Maj.	Va.	" "	
Roush, J. Edward	USAR	Maj.	Ind.	" "	
Saylor, John P.	USNR	Capt.	Penna.	" "	
Sebelius, Keith G.	USAR	Maj.	Kansas	" "	
Sikes, Robert F.	USAR	MG	Florida	" "	
St. Germain, Fernand J.	USAFR	Capt.	R.I.	" "	
Stafford, Robert T.	USNR	Capt.	Vermont	" "	
Stephens, Robert G., Jr.	USAR	LTC	Georgia	" "	
Waggoner, Joe D., Jr.	USNR	LCdr.	Louisiana	" "	
Walsh, William F.	USAFR	Capt.	N.Y.	" "	
Williams, Harrison A.Jr.	USNR	LtJG	N.J.	" "	
Wright, James C., Jr.	USAFR	LTC	Texas	" "	
Young, John	USNR	LCdr	Texas	" "	
Zablocki, Clement C., Jr.	USAFR	LTC	Wisconsin	" "	
Zion, Roger M.	USNR	Lt	Ind.	" "	

Name	Service	Rank	State	Pay Status	Comments
		RETIRED			
Albert, Carl B.	USAR	Col.	Okla.	With pay	
Bennett, Charles E.	USAR	Capt.	Florida	" "	
Bray, William G.	USAR	Col	Ind.	" "	
Cannon, Howard N.	USAFR	MG	Nev.	" "	
Dole, Robert J.	USAR	Capt.	Kansas	" "	
Fong, Hiram	USAFR	Col	Hawaii	" "	
Goldwater, Barry M.	USAFR	MG	Ariz.	" "	
Gurney, Edward J.	USAR	LTC	Florida	" "	
Moss, Frank E.	USAFR	Col	Utah	" "	
Nichols, William F.	USAR	Capt.	Ala.	" "	
Scott, Hugh	USNR	Capt.	Penna.	" "	
Sparkman, John J.	USAR	Col.	Ala.	" "	
Teague, Olin E.	USAR	Col.	Texas	" "	
Thurmond, James S.	USAR	MG	S.C.	" "	
Vigorito, Joseph P.	USAR	1st Lt.	Penna.	" "	
Wyman, Louis C.	USNR	Lt.	N.H.	" "	